NO. 2744

United States
Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES FIDELITY & GUARANTY COMPANY, a Corporation,

Appellant,

vs.

GEORGE B. BURKE and E. W. FERRIS, as Administrator of the Estate of DAVID L. KELLY, Deceased, and MOUNTAIN TIMBER COMPANY, a Corporation,

Appellees.

APPELLANT'S BRIEF.

Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

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BOYER PRINTING COMPANY, PORTLAND, OREGON

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STATEMENT OF FACTS.

Appellees, Burke and Ferris, were complainants in this suit instituted in the United States District Court for the Western District of Washington, Southern Division, to foreclose a mortgage which had been executed by the Mountain Timber Company to secure payment of the sum of $32,500.00. The mortgage covered a tract of timber land in Cowlitz County, Washington.

Subsequently to the institution of the suit the complainants filed a motion for a temporary injunction to restrain the defendant, Mountain Timber Company, from cutting or removing any timber then upon the premises described in the Bill, the basis for the application being the expressed fear of complainants that half of the timber standing upon the land at the time of the execution of the mortgage having been cut and removed therefrom, the continuation of that process would denude the land of all its timber, with the result that complainants' security would be inadequate to satisfy the amount of indebtedness, and that a deficiency judgment which complainants might obtain in the suit might be uncollectible because of the existing or prospective insolvency of the defendant, Mountain Timber Company.

A stipulation was thereafter entered into between the parties reciting the fact that the defendant had filed a bond in the sum of $45,000 with the U. S. Fidelity & Guaranty Company (Appellant herein) as surety, guaranteeing the payment of any judgment which might be rendered in favor of the Complainants in the suit, and that in consideration thereof Complainants withdrew their application for injunction. (Transcript of Record, pp. 9-19). The Bond referred to in the stipuation is as follows (Transcript of Record, pp. 10-11):

> "In the District Court of the United States for the Western District of Washington, Southern Division.
>
> GEORGE B. BURKE,
> Plaintiff,
>
> v.
>
> MOUNTAIN TIMBER COMPANY,
> a Corporation,
> Defendant.
>
> WHEREAS, in the above entitled

court and cause plaintiff above named, on the 25th day of April, 1913, filed his complaint asking judgment against the defendant for the sum of thirty-two thousand five hundred ($32,500.00) dollars, together with interest thereon at 5% from the 3d day of February, 1910, with attorney's fees, and in said complaint prayed for a temporary and permanent injunction enjoining the defendant from further cutting the timber upon lands described in said complaint;

NOW, THEREFORE, we, Mountain Timber Company, a Corporation, as principal, and United States Fidelity & Guaranty Company of Baltimore, Maryland, as surety, are held and firmly bound unto George B. Burke in the penal sum of forty-five thousand ($45,000.00) dollars for the payment of which, well and truly to be made, we hereby bind ourselves, our successors or assigns, provided, and the condition of this obligation is such that if Mountain Timber Company shall pay, or cause to be paid, in full any judgment which shall be rendered in favor of the plaintiff in the above entitled action, then this undertaking to be null and void, otherwise to be and remain in full force and effect.

Dated this 3d day of May, 1913.

Sgd. MOUNTAIN TIMBER COMPANY, by COY BURNETT, Principal.

Sgd. U. S. FIDELITY & GUARANTY COMPANY, by JOHN C. STANTON,
By Attorney in Fact,
Surety.

(S. Corporate Seal.)

The plaintiff consenting to the form and sufficiency thereof, this bond is hereby allowed and approved.

Dated May 5, 1913.

Sgd. EDWARD E. CUSHMAN,
Judge."

The District Court subsequently entered a foreclosure decree against the defendant, Mountain Timber Company, but instead of merely ascertaining therein the amount due upon the mortgage indebtedness, directing a sale, and providing for judgment in favor of the Complainants for any deficiency, the Judge of the District Court awarded judgment against the Mountain Timber Company and the U. S. Fidelity & Guaranty Company jointly for the sum of $44,128.00 representing the entire amount of original mortgage indebtedness, interest, attorney's fees, and costs, and proceeded to direct the foreclosure of the mortgage. (Transcript of Record, pp. 28-30.)

The Appellant, U. S. Fidelity & Guaranty Company, was at no time a party to the suit. It was afforded no opportunity to be heard, and had no notice of the contemplated judgment against it, except that a notice to the effect that same would be applied for on July 6, 1915, at the Court Room of said Court in Tacoma, Washington, was left with a clerk in the office of the statutory agent of Appellant, for the State of Oregon, at Portland, Oregon, on July 2, 1915. (Transcript of Record, p. 17.)

Upon the ground that the entry of this judgment against the U. S. Fidelity & Guaranty Company was unauthorized, said Company perfected this appeal and now urges said lack of authority, in addition to plain er-

rors manifest upon the face of the record, as ground for a reversal of said judgment insofar as same concerns this Appellant.

POINTS AND AUTHORITIES.

I.

In a suit to foreclose a mortgage the Court cannot, in advance of sale, render judgment for the full amount claimed to be due, but its power is limited to the rendering of a judgment for the deficiency remaining after the sale and application of the proceeds.

Jones on Mortgages, 7th Ed. Vol. 3, p. 370;
Dudley v. Congregation, 138 N. Y. 451; 34 N. E. 281;
Hull v. Young, 29 S. C. 71;
Parr v. Lindler, 40 S. C. 193; 18 S. E. 636;
Bailey v. Block, 104 Tex. 101; 134 S. W. 323;
Dodge v. Freedman's etc. Co., 106 U. S. 445; 27 L. Ed. 206;
Noonan v. Braley, 2 Black 499; 17 L. Ed. 278;
Orchard v. Hughes, 1 Wall. 73; 17 L. Ed. 560;
Rule 10 of Rules of Practice for Courts of Equity of the U. S.

II.

The so-called judgment herein being beyond the power of the court, it must be construed to be a mere ascertainment of the amount due by the Mountain Timber Company, mortgagor, as a necessary step in the foreclosure proceedings.

By fair and necessary interpretation the language of

the bond covers the payment of deficiency judgment only, since that is the only kind of judgment which could lawfully be rendered in foreclosure proceedings.

Barnes v. Chicago, etc. R. R. Co., 122 U. S. 1; 30 L. Ed. 1128;
Graham v. LaCrosse etc. R. R. Co., 70 U. S. (3 Wall.) 704; 18 L. Ed. 247;
Beach—Modern Eq. Prac., Vol. 2, p. 810.
Crocker v. Currier, 65 Wis. 667.

III.

The bond herein is not a statutory bond nor executed pursuant to, or in compliance with any Rule or Order of Court as a condition imposed by the Court upon the parties, and under such circumstances, the surety on the bond was not a party to the proceedings and an independent action was necessary to enforce liability upon the bond. Or, at least ancillary proceedings in this case were required, in which the surety would be entitled to proper notice, and to its day in court.

Beall v. New Mex., 16 Wall. 535; 21 L. Ed. 292;
Babbitt v. Shields, 101 U. S. 7; 25 L. Ed. 820;
Smith vs. Gaines, 93 U. S. 341; 236 L. Ed. 901;
Crocker and another v. Currier, 65 Wis. 667;
Earl v. Cureton, 14 S. C. 19;
Leslie v. Brown, 32 C. C. A. 556; 90 Fed. 171;
Terry v. Robinson, 122 Fed. 725.

ARGUMENT.

Nature of Decree in Foreclosure Proceedings.

Without citation of authority it may be premised

as a postulate in this discussion that a foreclosure suit is an extraordinary proceeding, and that foreclosure is an extraordinary remedy. In the absence of statute, or rules of court altering its scope, it is strictly a proceeding *in rem,* and the relief is confined to a subjection of the *res* to the indebtedness. An ordinary money "judgment," therefore, for the full amount of indebtedness, is a paradoxical expression in connection with a foreclosure suit. Jones in his work on Mortgages, 7th Ed., Vol. 3, at page 370, quotes with approval the following language of O'Brien, J., in Dudley v. Congregation, 138 N. Y. 451; 34 N. E. 281:

> "It was never intended to permit the joinder in the same complaint of two separate causes of action, one at law to recover a personal judgment on the bond for a debt, and the other in equity to procure a sale of the land covered by the mortgage given to secure the same debt and the application of the proceeds thereon. * * * *
>
> The established rule that when equity has obtained jurisdiction of the parties and the subject matter of the action, it may adapt the relief to the exigencies of the case, even to the extent of rendering a personal judgment, in order to prevent a failure of justice, does not apply here. That rule applies when the general basis of fact upon which equitable relief was sought has been made out, but for some reason it becomes impracticable to grant such relief, or where it would be insufficient, and not a case like this, where it appears that there never was in fact any ground for equitable relief whatever, but the sole remedy was an action at law."

In Hull v. Young, 29 S. C. 71, it was held that in

an action for foreclosure of a mortgage, no personal judgment for a debt, or any portion thereof, can be rendered against the mortgagor on his bond until after sale, and then only if the deficiency reported be unpaid. In delivering the judgment of the court the Chief Justice said:

> "In an action like this, it seems to us that no personal judgment for any specific sum of money can be rendered, even against the mortgagor, until the mortgaged premises have been sold, and the proceeds applied to the mortgage debt, for he can only be called upon in such an action to pay any deficiency in the proceeds of sale of the property pledged by him for payment of the debt, and we do not see how such deficiency can be ascertained until the property has been sold and the proceeds applied, and hence we do not see how any judgment for any specific sum of money can be rendered until the amount of such deficiency has been thus ascertained."

See to the same effect:

> Rooney v. Moulton, 60 Ill. App. 306;
> Parr v. Lindler, 40 S. C. 193; 18 S. E. 636;
> Bailey v. Block, 104 Tex. 101; 134 S. W. 323;
> Dodge v. Freedman Savings & Trust Co., 106 U. S. 445; 27 L. Ed. 206.

It is apparent therefore that the money judgment rendered by the District Court against the Mountain Timber Company was premature. The guaranty of the appellant Surety Company to pay any judgment

which would be rendered meant, of course, any lawful judgment. The liability of the surety could not be greater than that of its principal.

Parnell v. Hancock, 48 Cal. 452;
United States v. Burbank, 4 Wall. 186; 18 L. Ed. 321.

* * * * * *

If there were any doubt on this point it is absolutely removed *quoad* the Federal Courts by express decisions of the Supreme Court of the United States to the effect that in the absence of statute, or rules of court authorizing same, the Federal Courts do not have the power to award in a foreclosure suit a personal judgment, even for a deficiency remaining after sale and application of the proceeds.

Noonan v. Braley, 2 Black 499; 17 L. Ed. 278;
Orchard v. Hughes, 1 Wall. 73; 17 L. Ed. 560.

To obviate this difficulty a rule was adopted by the Supreme Court in 1864 permitting such deficiency judgment, and this rule appears in substance in the present RULES OF PRACTICE FOR THE COURTS OF EQUITY OF THE UNITED STATES; as

Rule 10.

"DECREE FOR DEFICIENCY IN FORECLOSURES, ETC.

In suits for the foreclosure of mortgages, or the enforcement of other liens, a decree may be rendered for any balance that may be found due to the plaintiff over and above the proceeds of the sale or sales, and execution may issue for the col-

> lection of the same, as is provided in rule 8 when the decree is solely for the payment of money."

If, therefore, there cannot be even a deficiency judgment in the Federal Courts in the absence of statute or rule, *a fortiori* there can be no personal judgment for the full amount in advance of sale. If the Federal Courts had the power to award such personal judgments there would be no reason for the existence of Rule 10, since the greater always includes the less. By the same token, the fact that the existence of such express authority was recognized by the United States Supreme Court as prerequisite to the lesser power, implies that, in the absence of similar authority, the greater is forbidden.

The entry, therefore, of a personal judgment against even the Mountain Timber Company at that stage of the proceeding was a palpable error, unless the language of the decree against the Mountain Timber Company be given the effect explained under the next heading of this discussion.

II

DECREES ARE TO BE CONSTRUED SO AS TO RENDER THEM VALID.—BOND COVERED PAYMENT OF DEFICIENCY JUDGMENT ONLY.

The rule of statutory construction, *ut res valeat magis quam pereat* is also applicable to decrees of courts.

In the language of the Supreme Court of the United States in Barnes v. Chicago, etc., R. R. Co., 122 U. S. 1; 30 L. Ed. 1128:

> "Every decree in a suit in equity must be considered in connection with the pleadings, and, if its language is broader than is required, it will be limited by construction so that its effect shall be such, and such only, as is needed for the purposes of the case that has been made and the issues that have been decided."

And the same Court said in the case of Graham v. La Crosse, etc., R. R. Co., 70 U. S. (3 Wall.) 704; 18 L. Ed. 247:

> "The decree was evidently intended to determine that issue. * * * It is our duty to construe the decree with reference to the issue it was meant to decide. Its words are very broad and very emphatic; but we cannot say that they were intended by the district court to have any greater effect than to avoid and set aside, as against Cleveland, the agreement and the judgment impeached by his bill. We think, on the contrary, that a decree having such an effect could not have been properly rendered upon the pleadings and issue in that cause."

See to same effect Beach Modern Eq. Prac., Vol. 3, p. 810.

The principle thus clearly announced was applied in a similar connection by the Wisconsin Court in Crocker and another v. Currier, 65 Wis. 667:

> "The judgment commences in the usual form of personal judgments. It is

> ordered and adjudged therein 'that the plaintiffs could have and recover of the defendant, John Currier, the said sum of $255.81,' with costs. It is urged that this is a personal judgment in the first instance, which in such actions is unauthorized. An examination of the judgment shows that no execution is awarded for the sum specified, but the judgment proceeds to direct a sale of the property, and provides that on confirmation of the sheriff's report of sale, if there be a deficiency, the plaintiffs may have personal judgment therefor and execution. In view of these facts, the portion of the judgment above quoted was not intended to be and is not a personal judgment against the defendant for the whole sum found due the plaintiffs, but only an assessment of the sum so due, as required by Section 3324, R. S. A judgment in similar form, in an action to foreclose a mortgage, was so construed by this court in Boynton v. Sisson, 56 Wis. 40. See also Huse v. Washburn, 59 Wis. 414."

Applying this principle, then, to the decree in the instant case, in the light of the reasoning and authorities incorporated under the preceding heading of this discussion, that decree must be construed not as a personal judgment against the Mountain Timber Company for the full amount of its indebtedness to complainants below, but as an ascertainment of the amount due, in accordance with the procedure in equity prior to the sale under foreclosure, and it follows that no lawful judgment against the Mountain Timber Company for the recovery of money has yet been entered.

In view of the fact, then, that the bond was given to

guarantee the payment by the Mountain Timber Company of any judgment against it in the suit, it is manifest that the condition of the bond has not yet been broken. An inspection of the bond will disclose the fact that no consideration for the suretyship is expressed—no benefit conferred, and no detriment suffered. The validity of the bond, therefore, if it be a valid instrument, must depend upon the pleadings and upon extraneous documents such as the stipulation, and upon the circumstances under which it was executed. If these be considered, the meaning of the bond is quite clear. It guaranteed the payment of a *deficiency* judgment.

No guaranty was necessary for the payment to the Mountain Timber Company of that portion of the indebtedness which would be realized by the sale under foreclosure. The application for injunction was made because of the expressed fear that there would be a deficiency, and that the Mountain Timber Company might be insolvent and unable to pay the deficiency. The application was withdrawn in consideration of the furnishing of a bond, the purpose of which was plainly to guarantee the complainant against loss in the event of such a contingency. We submit to the Court that this is the only construction that could reasonably be placed upon the instrument.

In the affidavit which formed the basis of the application for the injunction, it is averred (Transcript of Record, p. 8):

> "That said defendant (Mountain Timber Company) is heavily involved in debt, and divers and numerous suits and actions are pending against them in which said suits and actions, if said defendant is unsuccessful, large judgments will be

> secured against said defendant and will be prior liens to any *deficiency judgment* which might be obtained by said plaintiff in this action."

It is clear that the only judgment contemplated by the complainants was a deficiency judgment, and it was for the amount of this deficiency that the protection was desired.

That this fact was apparent to the Trial Court is indicated by the proviso in the Judgment Order in effect staying execution thereon until after the sale of the property, and limiting the scope of the execution to the deficiency remaining after the application upon the judgment of the proceeds of such sale. (Transcript of Record, pp. 29-30.)

If it be said that the appellant-surety suffers no injury so long as execution is withheld, we answer that that is no argument for permitting the entry of an unlawful judgment. The existence of such a judgment naturally affects the credit, standing, reserves, etc., of a surety company. It is also a fact that the courts have control of their own process (Freeman on Executions, Vol. 1, Sec. 32), and the same power which stays execution may thereafter withdraw the stay, and such action might be taken without notice to the judgment debtor. The appellant-surety objects to being placed in a position where such a contingency might at any time arise.

III

INDEPENDENT PROCEEDING AGAINST SURETY NECESSARY TO ENFORCE LIABILITY—SURETY AT LEAST ENTITLED TO NOTICE AND DAY IN COURT.

The power of courts with regard to the terms of their judgments and decrees has limitations. One of these is ordinarily that the judgment be one coming fairly within the purview of the pleadings, and that when entered it is to be entered against a party defendant and not a stranger to the action.

There are exceptions to this rule, and these exceptions insofar as law actions are concerned, are based upon statute, and insofar as concerns the United States Courts sitting in equity, upon rules of court or real or supposed precedent under the rules of the English High Court of Chancery.

For instance, in an ordinary action at law, in the absence of express statute authorizing a different remedy, no judgment can be rendered in the original proceeding against the surety on a forthcoming or redelivery bond, or even on a supersedeas bond, but the injured party is relegated to his action at law upon the instrument:

> Beall v. Terr. of New Mex., 16 Wall. 535; 21 L. Ed. 292;
> Babbitt v. Shields, 101 U. S. 7; 25 L. Ed. 820;
> Smith v. Gaines, 93 U. S. 341; 23 L. Ed. 901.

Where the bond is given pursuant to a statute authorizing the entry of judgment against the surety at the same time the judgment is entered against the principal, the theory on which the validity of such a proceeding is sustained is thus expressed by the Supreme Court of Oregon:

> "When judgment is entered against a party, it must be conceded that it would bind him *if* the court rendering the judgment had *jurisdiction* of his *person* and of

> the *subject* matter of the suit or action; and, such being the case, our *statutes* above referred to in effect provide that when the surety signs an undertaking on appeal and for a stay of proceedings he *forms a privity of contract* with the *judgment debtor,* and, like his principal, thereby becomes a *party* to and is bound by the judgment." (Italics ours.) Holbrook v. Investment Co., 32 Or. 104, 106.

An apparent exception to this doctrine inheres in the practice obtaining in the Federal Courts where a temporary injunction is issued, conditioned upon filing a bond to pay damages resulting from the awarding of the injunction. Under the exceptional practice referred to, judgment, in the event of dissolution of injunction, is entered against the principal and surety on the bond. (This practice is said to be against the "undoubted weight both of authority and principle" by High on Injunction, 3 Ed. Sec. 1657; condemned as improper by Mr. Justice Curtis in Circuit, Merryfield v. Jones, 2 Curt. C. C. 306, Fed. Case No. 9486, and by the Supreme Court of the United States in Bein v. Heath, 53 U. S. (12 How.) 168; 13 L. Ed. 939, though approved, *obiter dicta* Russell v. Farley, 105 U. S. 433.)

A brief consideration of this exception will disclose the *rationale* of its existence. When a bill is filed for the purpose of enjoining defendants from the commission of certain acts the illegality of those acts is the primary matter for consideration in the case.

The Court, for the reason that prompt action is required and there is no time for taking of testimony or mature deliberation, grants provisional relief upon a condition which it imposes, i. e., that the defendant shall

not be harmed if it develop that the action of the Court is in contravention of his rights. Such a bond contains the explicit provision that the *obligors* will pay the damage awarded and ascertained to have arisen out of the unjustified restraint. It may almost be said that in practice the requirement and giving of the bond is a jurisdictional step, and the surety who joins with the plaintiff in such an obligation is in a measure, at least, a party privy to the suit. The Court which grants such extraordinary relief has the right to impose conditions, and it is upon this theory that the Federal Courts have assumed jurisdiction, where a bond is executed to conform to the order of Court as a condition precedent to the issuance of an injunction, to enter judgment against the plaintiff and his surety in the original case, upon dissolution of the injunction for the damages ascertained to have resulted.

It sometimes happens that a Court, impressed with the idea that the plaintiff is entitled to injunctive relief, at the outset of a case, but cognizant, nevertheless, of the fact that the results to the defendant, if same is granted, might be very serious, will enter an order to the effect that plaintiff is entitled to the temporary injunction prayed for, and that same shall issue unless the defendant shall within a certain fixed time file a bond guaranteeing to save the plaintiff harmless from the results of the contemplated course of action of the defendant, in the event same proves to be unlawful.

We have been unable to find a case in either the State or Federal Courts holding that judgment may be entered against the surety on such a bond in the same proceedings. Apparently the plaintiff under such circumstances is relegated to an ordinary action at law on the bond.

Even though it be argued, in the absence of authority, that there is no reason in principle why the Court which asserts authority to award a judgment against the surety on a bond required as a condition of awarding injunctive relief, should not exercise similar authority as to the surety on a bond required as a condition of denying injunctive relief, the fact is to be borne in mind that in the instant case the bond was *not* given pursuant to any such order of the Trial Judge, but pursuant to an agreement between the parties, and that, as a matter of fact, the application for injunction was actually *withdrawn* by complainant from the consideration of the Court. (Findings of Fact, Transcript of Record, p. 20.)

Under such circumstances the bond was, to all intents and purposes, a purely extraneous document, and the Court had no more authority to enforce its terms in the foreclosure suit than to enforce any other agreement made by any of the parties with outside persons with regard to any other matter, not comprehended in the pleadings.

* * * * * *

We have discussed this question of the power of the Court in cases of bonds executed as conditions of injunctive relief, because, in the absence of any explanation from the appellees of the basis for the judgment complained of, we have after, the exclusion of every other consideration, been compelled to assume that it must be in the mistaken belief that it was justified by some such analogy.

The rules of logic impress strongly the danger of argument from analogy. The resulting fallacy is here apparent in the fundamental difference pointed out between a bond exacted as a condition for injunctive

relief, and a bond, executed not in pursuance of an order of court requiring it, but by virtue of a private agreement.

The principle that parties are entitled to their day in court is one of such vast importance under our system of jurisprudence that it should not be frittered away by devising sophistical reasons for creating exceptions. Surely notice and an opportunity to be heard should be afforded before judgment is entered against one not a party to the cause. Had such an opportunity been afforded in the present instance to appellant-surety, the attention of the Court could have been directed to the reasoning and authority hereinbefore cited, which apparently demonstrates the fact that the only judgment which could have been lawfully entered at that stage of the proceedings was one merely ascertaining the amount due, and that the only judgment, payment of which the surety guaranteed, was a deficiency judgment—that the decree of the Court was not in any proper sense a personal judgment against the Mountain Timber Company within the terms of the bond.

As said by the South Carolina Court in Earl v. Cureton, 14 S. C. 19, where judgment was entered against one who had become surety for costs:

> "The obligation of C. in this case did not waive the right of defense or furnish any authority for taking a judgment against him without a regular action to charge him thereunder."

And it would seem the better opinion that even where judgment is given on a bond required as a condi-

tion for injunctive relief, notice of the proposed action should be given the surety.

> Leslie v. Brown, 32 C. C. A. 556; 90 Fed. 171;
> Terry v. Robinson, 122 Fed. 725.

No notice in any proper sense of the term was given the Surety Company in this case. The U. S. Fidelity & Guaranty Company is a Maryland corporation, with its principal office at Baltimore, Maryland. The bond was executed on behalf of the company at Tacoma, Washington, by its agent for the State of Washington, and the action was pending in the United States District Court at Tacoma.

On Friday, July 2nd, what is denominated a "Notice" that judgment would be applied for on July 6th, was served on a person termed in the return a "clerk" in the office of Douglas R. Tate, statutory agent of the company for the State of Oregon, at his office in Portland, Oregon.

An inspection of the calendar will disclose the fact that July 2nd was on a Friday. The 4th fell on Sunday, and the 5th (Monday) was celebrated as a legal holiday. A service under such circumstances on an individual having no contractual or other relations with the appellant-surety can scarcely be dignified by the term "Notice."

* * * * * *

ANOMALOUS CHARACTER OF THE JUDGMENT—ANALYSIS OF THE SITUATION.

We have here a most anomalous situation. The principal, it must be conceded, cannot be compelled to pay the personal judgment until after the sale and the

ascertainment of the deficiency. The United States Supreme Court has said that the liability of the surety cannot exceed that of its principal. Nevertheless, apparently, under the terms of the Court's decree the surety can be so mulcted, provided the Court at any subsequent stage sees fit to cancel its stay of execution. We have, we believe, already pointed out with sufficient clarity that the fair construction of the bond is that it is a guaranty for payment of the deficiency judgment. We proceed now to an analysis of certain other aspects of the situation.

* * * * * *

The express condition of the bond creates liability on the surety in the event of the non-payment by the principal-defendant of the *judgment rendered in the foreclosure suit.* It cannot be contended, for instance, that under the terms of the bond a judgment could be awarded against the appellant-surety *before* a judgment had been awarded against the principal, the Mountain Timber Company. Liability upon the appellant-surety would not accrue until the existence of a lawful judgment, payment of which by the Mountain Timber Company was thus guaranteed.

All that could be claimed with regard to the liability of a surety must arise under a fair construction of the terms of its bond—such terms even though not strictly construed are certainly not given a remedial construction enlarging their scope by intendment. The appellant-surety never agreed that judgment might be awarded against it *simultaneously* with judgment against the principal-defendant. It only agreed to see to it that the principal-defendant paid the judgment against itself, and there could be no breach of this until *after* the *entry* of such a judgment *against* the *principal*

—yet the Trial Court entered judgment against the principal-defendant, and the appellant-surety *jointly.*

* * * * * *

Further analyzing the Court's action, it will be apparent that it was unauthorized for another fundamental reason.

It is to be borne in mind that the decree against the Mountain Timber Company ordering foreclosure is a decree entered, *not upon the bond,* but upon its obligation in the shape of a note for $32,500.00, interest, etc. The obligation of the surety arises under *another* and *entirely different instrument.* If the judgment against the Mountain Timber Company is upon the bond, it forms no basis for the foreclosure, since the mortgage was executed to secure payment of a note for $32,500 and not a bond for $45,000.00. It is, of course, manifest, that the "judgment" (in reality the ascertainment of indebtedness) against the Mountain Timber Company is upon the mortgage note and this fact would preclude the idea of "joint" judgment on that instrument against the maker and a stranger to it.

There is here apparent another basic distinction between the awarding of judgment against the plaintiff and his surety on a bond conditioned for injunctive relief, and the awarding of judgment in this instance. Where a suit is brought in which the prayer is for a temporary injunction, and same is allowed the plaintiff upon condition of his filing his bond with proper surety to pay all damages which may be awarded because of the unlawful restraint thus imposed upon the defendant, the judgment against the plaintiff and surety is on the single obligation in the case, a joint obligation which for reasons heretofore adverted to may be said to be fairly within the purview of the pleadings.

In such a supposed case, where the doctrine referred to has been invoked in the Federal Courts, the judgment for such damages is the only judgment which is awarded against the plaintiff, and it grows out of the sole obligation in the case i. e., the bond given by him and his surety as a condition of getting the relief for which he prays. In the instant case, the bond, as before pointed out, is a matter separate and apart from the primary relief, i. e., *foreclosure,* and the judgment against the principal-defendant, Mountain Timber Company, is based *not upon the bond,* but upon the *mortgage indebtedness* which is being foreclosed.

The principal-defendant, the Mountain Timber Company, of course, signed the bond along with the appellant-surety, but that bond was an agreement to pay any judgment which might be rendered in the cause, and the judgment referred to was, of course, the judgment prayed for in the bill of foreclosure and *not a judgment on the bond.*

It would seem that any one of these many considerations would suffice to demonstrate the plain error of the lower Court in entering a personal judgment against the surety at this stage of the proceeding, and the resulting situation demonstrates the importance of allowing parties their day in court.

We respectfully urge, for the reasons hereinbefore stated, that insofar as the decree of the United States District Court for the Western District of Oregon, Southern Division, in this cause purports to award a personal judgment against the U. S. Fidelity & Guaranty Company, same be reversed.

Respectfully submitted,

BEACH, SIMON & NELSON,

Attorneys for U. S. Fidelity & Guaranty Company, Appellant.

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